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No._____

SUPREME COURT OF THE UNITED STATES

_____Term, 1942

WILLIAM T. BRADFORD AND BEN F. BRADFORD,

Versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, WILLIAM T. BRADFORD and BEN F. BRADFORD, citizens of the United States, domiciled in the State of Louisiana, respectfully bring this their application for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

The petitioners were convicted in the District Court of the United States for the Western District of Louisiana for violating the Mail Fraud Statute, (Section 215, Criminal Code; 18 U. S. C. A., 338). WILLIAM T.

BRADFORD was sentenced to serve a term of two (2) years, and BEN F. BRADFORD a term of three (3) years at Atlanta, Georgia. They were originally indicted on five (5) counts and convicted on Count One, and found not guilty on the other four (4) counts. Petitioners therefore took their appeals to the United States Circuit Court for the Fifth Circuit, where judgment was rendered affirming their conviction on July 9, 1942 (129 Federal Reporter, August 24, 1942, Page 274), Within the delays allowed by law, petitioners filed a petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit, which was denied on September 17, 1942.

That on the 21st day of September, A. D., 1942 a stay of mandate was ordered by the United States Circuit Court of Appeals for the Fifth Circuit for a period of thirty (30) days from October 17, 1942 to enable these petitioners to apply to this Honorable Court for a writ of certiorari to review said judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

The statute under which defendants were convicted (Sec. 215, Criminal Code; Title 18, U. S. C. A. 338) reads in part, as follows:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ***shall, for

the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such thereform, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisonment not more than five years, or both." (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130.)

JURISDICTION

The jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28 U. S. C. A.), making it competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within thirty (30) days after

entry of judgment, as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

The indictment in this case charged in Count One on which the defendants were convicted that because of the political influence of W. T. BRADFORD, a member of the Louisiana Legislature, and BEN F. BRADFORD, Commissioner of Finance of the City of Alexandria, they entered into a scheme with Monte E. Hart to defraud the City of Alexandria by purchasing city buses at a higher price than they could have bought them, and that they received the sum of Two Thousand & No/100 ($2000.00) Dollars paid to W. T. BRADFORD and Nine Hundred & No/100 ($900.00) Dollars paid to BEN F. BRADFORD.

The indictment charged that in furtherance of the scheme to defraud the City of Alexandria they caused to be mailed a check for Thirty-Four Thousand Six Hundred Nine & 02/100 ($34,609.02) Dollars drawn by the Dunnam Motor Company of Alexandria to the Transit Bus Corporation in the City of New Orleans; it is on this mailing that they relied for a conviction on Count One of the indictment.

QUESTIONS PRESENTED

There are several serious questions to be presented in our petition for a writ of certiorari. Many of these questions are presented in our Assignments of Error in

our petition for a rehearing to the United States Circuit Court of Appeals. The Court held in its opinion that twelve (12) of the Assignments of Error without merit enough to warrant special attention.

Assignment of Error # 2 which covered the overruling of a motion for a directed verdict at the close of the Government's case, we think deserved special attention. The same is true of our Assignment of Error # 3 which covered the motion for a directed verdict at the close of all the evidence. Assignment of Error # 8, we feel was most serious, which was based on the refusal to allow Don Moriarity to testify on a motion for a new trial for the purpose of showing that the evidence of the principal government witness, L. O. Taylor, was grossly erroneous. Assignment of Error # 9 was based on the proposition that only (11) of the jurors who tried the case were drawn from the veniremen which the Jury Commission had drawn, and that one of the jurors who served was not drawn by the Jury Commission.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a writ of certiorari are covered by the Assignments of Error above mentioned.

1. That the constitutional and statutory rights of petitioners have been infringed by the conviction for using, or causing the mails to be used in furtherance of a scheme to defraud, when the mailing charged was

proven to have been made after the transaction was closed and consummated.

2. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using, or causing the mails to be used in furtherance of a scheme to defraud, when the Court overruled a motion for a directed verdict at the close of all the evidence in the case.

3. The constitutional rights of petitioners were denied, when the Court failed to set aside the verdict of guilt, when it was proven on motion in arrest of judgment that only eleven (11) of the jurors who convicted the accused were qualified jurors.

4. That the constitutional and statutory rights of the petitioners have been infringed by a conviction for using or causing the mails to be used in furtherance of a scheme to defraud, as a result of the affirmation of the entire verdict and sentence of the trial court by the Circuit Court of Appeals for the Fifth Circuit.

TRANSCRIPT ANNEXED

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioners now file herewith ten copies of the record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioners also file herewith and make part of this application their brief in support hereof.

PRAYER

Wherefore, petitioners respectfully pray that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioners, setting aside their conviction and sentences pronounced below, and discharging them forthwith; and petitioners pray for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

T. W. HOLLOMAN
T. FRITH HUNTER
JOHN R. HUNTER
Attorneys for petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The first reason relied on for allowance of the writ is that the constitutional and statutory rights of petitioners were infringed by a conviction of using the mails in furtherance of a scheme to defraud, when the mailing charged was made after the deal was closed and consummated. The fraud as alleged in the indictment con-

cerned a deal between the Dunnam Motor Company of Alexandria (the local Ford agent), and the City of Alexandria for the purchase of certain buses to be used on the streets of Alexandria. The undisputed evidence shows that the City of Alexandria issued its check in favor of the Dunnam Motor Company for the agreed price of the buses and that said check was drawn on the Guaranty Bank & Trust Company, a local bank; that the Dunnam Motor Company deposited the check of the City in the Guaranty Bank & Trust Company and received credit on their account for the same. We take the position that when this payment was made and the credit given the Dunnam Motor Company that the deal was consummated, and that any subsequent use of the mails by any party other than the principals named, is not and was not such a case as is contemplated by the Mail Fraud Statute.

We take the position that the mailing or causing of the letter to be mailed is the crime and not merely devising a fraudulent scheme, and that it is vital to the commission of the offense that the letter be mailed in furtherance of the scheme. We take the position that no letter was mailed in furtherance of the scheme and that the mailing charged in the indictment and proven in the case was done after the deal had been consummated, and therefore did not support the charge or justify the conviction.

Dyhre vs. Hudspeth, 106 F (2) 286;

Floyd D. Stapp, et als vs. U. S., 120 F. (2) 898;

Spillers vs. U. S., 47 F. (2) 893;
McNear vs. U. S., 60 F. (2) 861;
Armstrong vs. U. S., 65 F. (2) 853;
Little vs. U. S., 73 F. (2) 861;
Merritt vs. U. S., 95 F. (2) 669.

The second reason relied on for the allowance of the writ is that the constitutional and statutory rights of petitioners have been infringed by the Court's overruling the motion for a directed verdict at the close of all the evidence in the case. This proposition involves the review of all the evidence in the case, and we respectfully request the Court to consider the summary of the evidence and our argument under Assignment of Error # 3 as contained in the brief of Appellants filed in the Circuit Court of Appeals.

Briefly summarized the evidence in the record shows that the City of Alexandria advertised for bids on eight buses; that bids were offered by several companies; that the lowest bid was that of the Ford Agency in Alexandria; that all of these bids were rejected. That subsequently, the City bought from the Ford Motor Company, through its local representative, the Dunnam Motor Company eight (8) buses, and that the price paid by the City was Four Hundred Twenty-Five & No/100 ($425.00) Dollars cheaper per unit than the lowest bid received.

We submit that the testimony of all the witnesses, including the Government witnesses, established conclusively that it was impossible for the City to have

bought these buses any cheaper; that they could not have been bought directly from the factory, and that the prices paid were exceedingly reasonable.

We submit that these facts have been established. It follows that no fraud was perpetrated upon the City of Alexandria but that on the contrary the rights of the citizens of Alexandria were not only respected but protected in the deal that was made. We submit that under the summary of the evidence above referred to there was nothing to show that W. T. Bradford and Ben F. Bradford were associated in this deal, but on the contrary that they were personally and policitally opposed one to the other, and that W. T. Bradford did not undertake to influence any of the City Commissioners in the deal that was made.

We submit that the evidence shows that W. T. Bradford was promised a commission of five (5%) per cent by one Ahrens, who was connected with the Transit Bus Corporation of New Orleans, who were interested in the deal as selling agents with the Dunnam Motor Company, and that W. T. Bradford, as Judge Sibley says in his dissenting opinion, "was paid a good deal for doing very little."

In this connection we quote briefly from the dissenting opinion of Judge Sibley of the Circuit Court of Appeals, who speaking of Ben F. Bradford, says:

> "He was paid money in connection with the sale. While the evidence is not strong against him, it

> justifies a verdict under the principles decided in the Shushan case."

and continuing Judge Sibley says:

> "I find no evidence at all that W. T. Bradford had any part in or knowledge of the corrupting of Ben Bradford. The evidence touching W. T. Bradford is hardly a score of lines in the record. ****Nothing suspicious, much less criminal, is shown to have been done by W. T. Bradford."

We submit that a consideration of all the evidence in the case as shown by the record and summarized in the brief of Appellants warrants a review of the case as to both defendants.

We next wish to call attention to an error of law contained in the majority opinion of the Circuit Court of Appeals and repeating in the opinion rendered in refusing a hearing herein, with respect to the failure of W. T. Bradford to take the witness stand and testify in his own behalf. As we read the opinion of the Circuit Court of Appeals on this point, it almost goes to the point of holding that the failure of an accused to take the witness stand creates a presumption of guilt against him.

In passing upon our petition for a rehearing Judge Holmes, who handed down the original decision, declares:

> "No man can be compelled to be a witness against himself, but sometimes in the progress of a trial the

burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury."

We submit that this is not the law, and that the holding is tatamount to a declaration that were the accused fails to take the stand, the burden of proof shifts from the State to the defendant. We think this is manifestly erroneous because the burden of proof is on the Government to prove the guilt of the accused and the presumption of innocence protects the defendant from any contrary presumption arising from his failure to testify, and the burden still remains with the Government, and such failure to give evidence in his own behalf cannot properly be construed against him or in favor of the Government.

Wilson vs. U. S., 149 U. S. 60, 37 Law Edition 650.

Groves vs. U. S., 150 U. S 118; 37 Law Edition, 1021.

Among the reasons assigned for the allowance of the writ is that both the lower Court and the Appellate Court failed to set aside the verdict on the gound set forth in the motion in arrest of judgment that only eleven (11) of the purors who participated in the trial of the case were legally drawn thereon.

The Trial Judge and the Appellate Court did not consider that this matter contained any merit and summarily dismissed the objection without comment. We

submit that the motion in arrest of judgment and the supporting affidavits attached thereto show that one James G. Russell was drawn on the jury, and that James G. Russell, Jr., was served, came to Court and became the Foreman of the Trial Jury. There is no dispute on this proposition, and we think the record convincingly shows that the man drawn on the jury did not serve, and that the party who did serve on the jury was not drawn thereon. We submit that this objection is not only serious but vital. We submit that the law requires the concurrence of twelve (12) jurors in order to render a legal verdict, and the participation of a juror who was not drawn on the panel would deprive petitioners herein of their right to a jury legally impaneled and to a verdict supported by all twelve (12) of the jurors legally drawn. We earnestly submit that the motion in arrest of judgment is good, and that fatal error exists which of itself is sufficient to justify a review of the whole case.

We further contend that there was error in the judgment of the Circuit Court of Appeals in overruling all of the Assignments of Error contained in the record, and in addition to the matters hereinabove presented, we wish to emphasize as special error the refusal of the Trial Judge to permit the witness, Moriarity, who was tendered in support of a motion for a new trial, to testify as to the cost of the buses, when he said witness could have shown that the testimony of L. O. Taylor, Government expert, was grossly erroneous.

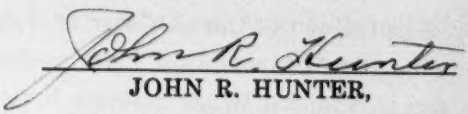
This matter becomes important because the Circuit

Court of Appeals bases its opinion largely on the proposition that the basis of the fraud was the exorbitant price charged the City of the buses. The error we suggest in this connection was the refusal of the Trial Judge to permit Moriarity to testify because he was not an expert, when the record shows that he had had more experience in the automobile business than Taylor, the Government witness, who had spent his life as a Post Office Inspector.

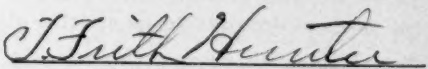
CONCLUSION

We respectfully urge that the issues raised by this case are serious and important ones, and that the errors of law complained of present rulings contrary to the established jurisprudence of the United States Supreme Court, and that, to the end that those errors may be rectified, a writ of certiorari should issue.

Respectfully submitted,



JOHN R. HUNTER,



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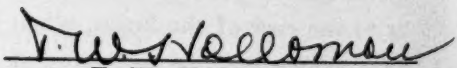

T. W. HOLLOMAN,

Attorneys for Petitioners.

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 455

WILLIAM T. BRADFORD AND BEN F. BRADFORD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority opinion in the circuit court of appeals affirming the convictions (R. 458–466) and the opinion of Circuit Judge Sibley dissenting in part (R. 466) are reported at 129 F. (2d) 274. The opinion of the circuit court of appeals on petition for rehearing (R. 482–483) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 9, 1942 (R. 467), and a petition for rehearing was denied September 17, 1942

(R. 483). The petition for a writ of certiorari was filed October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the convictions.

2. Whether, where no prejudice is alleged or shown by petitioners, the trial court erred in failing to set aside the verdict on motion in arrest of judgment on the ground that James G. Russell, Jr., a qualified juror who served on the jury which convicted petitioners, was not legally drawn for jury service.

3. Whether reversible error resulted from the refusal of the trial court to permit the witness Moriarity to testify as an expert at the hearing on petitioners' motion for a new trial in order to show that the computations offered by a Government witness at the trial were erroneous.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, represen-

tations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioners and Monte E. Hart were charged in a 5-count indictment returned in the Western District of Louisiana with using the mails in execution of a scheme to defraud, in violation of the mail fraud statute (*supra*) (R. 1–13). Count 1, and each of the other counts by reference to that count, alleged that petitioners and Hart devised a scheme to defraud which consisted of using the political influence and official positions of peti-

tioners to sell motor busses to the City of Alexandria, Louisiana, at excessive prices, so that the defendants would and did acquire unearned commissions and profits in the sum of approximately $2,900 on two sales of busses to the city, one of 8 busses in October 1937 and the other of 4 busses in July 1938 (R. 1–5). A separate mailing in execution of this scheme was alleged in each count (R. 5–13).

Petitioners were found guilty under count 1 of the indictment and not guilty under the four remaining counts (R. 18).[1] Motions for directed verdicts, a new trial, and in arrest of judgment were filed and overruled (R. 17–22, 31, 261, 391, 431, 449, 451–454). Petitioner William T. Bradford was sentenced to imprisonment for a period of 2 years; petitioner Ben F. Bradford to imprisonment for a period of 3 years (R. 32–33). On appeal, the circuit court of appeals affirmed the conviction, Judge Sibley dissenting as to the conviction of petitioner William T. Bradford on the ground that the evidence was insufficient to support the verdict against him (R. 466, 467).

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[1] Hart committed suicide on September 7, 1940 (R. 50), after the indictment was returned and before trial. He had previously been convicted of using the mails to defraud (*Hart* v. *United States*, 112 F. (2d) 128 (C. C. A. 5)), and was also a co-defendant in the case of *Weiss* v. *United States*, 120 F. (2d) 472, rehearing denied, 122 F. (2d) 675 (C. C. A. 5), certiorari denied, 314 U. S. 687. His suicide occurred shortly before Weiss went to trial. See opinion below, R. 459.

The Government's case may be summarized as follows:[2]

On June 7, 1937, when Victor M. Ake was Commissioner of Finance and Public Utilities of the City of Alexandria, Louisiana, the city council, composed of Mayor V. V. Lambkin and two commissioners (R. 262), authorized advertisements for bids on 8 motor busses to replace 8 of the 12 Mack motor busses in operation in the city. The specifications for the bids were prepared by Henry Jones, foreman of the municipal shop for the maintenance of busses (R. 61–62, 63–66, 69–70, 91–93). On July 6, 1937, the city received bids from five different companies, which were referred to Commissioner Ake for tabulation (R. 69–72, 94). Three of the bids submitted complied with the specifications advertised, but were higher than the alternative bid of $3,936.15 per unit received from the General Motors Truck and Coach Company and the bid of $4,973.54 per unit received from the Dunnam Motor Company, Alexandria, Louisiana (hereinafter called "Dunnam Motor"), respectively, on busses which did not meet the specifications (R. 69, 71, 102). All of the bids, with the exception of the Dunnam Motor and Roby Motor Company bids, were submitted

[2] The evidence before the trial court and the circuit court of appeals included numerous physical exhibits (R. 441) which, we are informed by the Clerk of this Court, have not been filed with the Court. For the most part, however, the contents of the exhibits are revealed by the record.

by the manufacturers direct (R. 67, 68, 69, 71, 86–87). The indications, according to C. L. Hayne, a partner in Dunnam Motor (R. 217), were that the Mack bid would be accepted (R. 219).

Commissioner Ake died on July 18, 1937 (R. 72, 266), and on July 20, 1937, petitioner Ben F. Bradford was appointed by Earl K. Long, Acting Governor of Louisiana, to take his place (R. 51–52, 65, 266, 363). Bradford, who had been closely associated with Mayor Lambkin for several years (R. 282), took over the supervision of the city transportation system, was primarily responsible for the bus department (R. 225, 293), and wanted to buy the Ford busses from Dunnam Motor (R. 295). Jones preferred the more than $1,000 cheaper General Motors model to the Ford busses, but was not consulted concerning the purchase of busses after Bradford became commissioner (R. 97, 98–100).

Negotiations for the sale of Ford busses to the city were carried on principally by F. H. Ahrens (R. 191, 192, 194, 207–208, 220), who had a half interest in the profits of the Transit Bus Corporation (hereinafter called "Transit Bus") (R. 184), a Ford dealer company which was financed by its president, defendant Monte E. Hart, who also was connected with the Hart Enterprise Electrical Corporation (hereinafter called "Hart Enterprise"), and National Equipment Company

(hereinafter called "National Equipment") (R. 109–110, 172–181, 185, 197–198, 201). On several occasions, Ahrens, Hayne, and Hughes, a representative of the New Orleans branch of the Ford Motor Company who gave Ahrens and Hayne technical advice only (R. 111, 113, 138, 189), conferred with the city council, composed of the mayor, petitioner Ben F. Bradford and Commissioner Bringhurst (R. 111, 113–114, 220). Commissioner Bringhurst did not remember seeing Ahrens, made no independent examination with respect to prices other than to study the bids submitted, and thought the city was dealing only with Dunnam Motor (R. 313–314).

Ahrens also called on Mayor Lambkin, Hayne of Dunnam Motor (who was a brother-in-law of Mayor Lambkin's son Charles (R. 286)), and petitioners Ben F. Bradford and William T. Bradford, who is Ben's cousin (R. 191, 213, 217, 208, 209, 220, 366). Arrangements were made whereby Transit Bus was to get three-fifths of the profits and Dunnam Motor two-fifths or approximately 15 and 10%, respectively, on the deal (R. 200).

Petitioner William T. Bradford was at that time a member of the House of Representatives of the State of Louisiana (R. 51) and Secretary-Treasurer of the State Colony and Training School (R .57–59). Ahrens had known him for a number of years and, in collaboration with Monte

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E. Hart, agreed to pay him approximately 5% from the profits on the prospective bus deal for using his influence in connection therewith (R. 191–193, 211). Petitioner William T. Bradford kept Ahrens "posted on how things were going up here" and "used his influence to help" Ahrens "sell the busses" (R. 193).

On one occasion, petitioner Ben F. Bradford, Mayor Lambkin, Hayne and his wife, Charles Lambkin and his wife, and Superintendent of Busses Sid Pearce and his wife made a trip to Dallas to investigate the Ford busses. They spent several dollars riding around on the busses but did not consult with the owners to determine what service the busses were giving. Although the city appropriated $100 for the expenses of the trip, Commissioner Bradford paid the expenses of the mayor, Mr. Pearce, and himself. (R. 380, 382, 383.)

On September 7, 1937, the city council of Alexandria rejected all of the bids submitted on July 6 (R. 72–73), and on September 14, 1937, without advertising for bids on new specifications, approved a resolution authorizing Mayor Lambkin to purchase from Dunnam Motor 8 Ford motor busses at $4,566.54 each, less tires to be furnished by the city. The resolution stated that an extreme public emergency required the immediate purchase of the busses for the Municipal Bus System. (R. 73–74, 81, 308.) No emergency in fact existed,

for the Mack busses then in operation in the city could have been continued in service for at least another year (R. 96, 104).

By a check dated October 25, 1937, the City of Alexandria paid Dunnam Motor $36,532.32 for the 8 busses, less tires (R. 74–75, 222, 246–247, 322, 323, 378), of which amount Dunnam Motor paid Transit Bus $34,429.02 by a check drawn on the Guaranty Bank and Trust Company, Alexandria, Louisiana (R. 222). This latter check was endorsed by Ahrens and Hart and deposited in the Whitney National Bank, New Orleans, Louisiana, to the account of National Equipment, and was sent through the mail to the Guaranty Bank and Trust Company on October 26, 1937, for collection (R. 161, 172–173, 195), and it is this mailing which is the basis of Count 1 of the indictment (R. 5). Transit Bus paid the Ford Motor Company $27,674.32 for the 8 busses (R. 175–176, 194–195), which, minus $777.84 refunded by the Ford company to Dunnam Motor as excise tax after city officials executed exemption certificates therefor (R. 119, 122–123, 124, 126, 143, 222–223), left $26,896.48 as the cost of the 8 busses, including transportation and charges for extra equipment, but without tires (R. 114, 119, 141–142, 245).[3]

[3] The city contracted for the tires separately (R. 224) and at least $684 additional was later spent on the busses to change the generators, compressors, and seats (R. 301–302, 350–354).

The City of Alexandria therefore paid $9,635.84 over and above the actual cost of the busses, including the excise tax of $777.84 which was refunded to Dunnam Motor but was never repaid to the city (R. 82, 124–125, 144, 255).[4] Figured on a commission basis, this was a profit to the sellers of 27.94% (R. 244–248), which, there was evidence to show, was excessive. Transit Bus could have sold direct to the City of Alexandria instead of splitting the profits from the sale with Dunnam Motor (R. 127).[5] Hayne testified that he would have liked to see the deal go through even if his company, Dunnam Motor, were to receive no profit from it (R. 229–230). The witness Hunt, of the Transit Bus Sales Division of the Bull-Stewart Equipment Company, Dallas, Texas, to which the business of Transit Bus was later transferred (R. 332),[6] testified that "If we can make ten per cent [profit] we are tickled to death with it" (R. 335). Ahrens testified that if the City of Alexandria had asked him to cut $2,000

[4] It appears that the bid prices customarily include the excise tax and that the excise tax refund should have been paid to the City of Alexandria. See R. 107, 121, 124–125, 143.

[5] The Ford Motor Company might itself have sold direct to the city, but probably would not have done so because it had a dealer (Transit Bus) for the city (R. 145, 149, 150–154).

[6] The total business transacted by Transit Bus consisted of the sale of 12 busses to the City of Alexandria and the sale of 3 busses to the Shreveport Railway Company (R. 202–203).

off the price he would have accepted the deal and would also have taken care of petitioner William T. Bradford's 5% commission (R. 215).

From the profit on this transaction, Monte E. Hart, on December 10, 1937, drew a check for $2,000 with which to pay petitioner William T. Bradford the promised commission for using his influence in the deal. On the same date Ahrens cashed the check and paid Bradford $2,000 in cash at Ahrens' office in New Orleans. (R. 198–200, 204, 213, 215–216.) The $2,000 was never remitted to the City of Alexandria (R. 86).

Eight months later, on June 6, 1938, the city council, without advertising for bids, approved another resolution authorizing the mayor to purchase 4 more busses from Dunnam Motor at $5,136.20 each to replace the remaining 4 old busses; this resolution also stated that an extreme public emergency required the purchase of the busses for the Municipal Bus System (R. 76–79, 81, 100, 308–309). The contract for the purchase of the 4 busses had been made on May 16 (R. 80), and petitioner William T. Bradford assisted Ahrens in effecting this deal (R. 213). The total cost to Transit Bus of each of these busses, with less extra equipment than was included with the busses sold in the first deal, had increased $80.39 over the September 1937 unit cost (R. 254), but the price at which the mayor was authorized to buy the 4 busses was increased by $569.66 per

unit, making a net unexplained increase of $489.27 per bus, or a total of $1,957.08.

On July 5, 1938, the City of Alexandria paid Dunnam Motor $20,544.80 for the 4 busses (R. 225, 249, 250). Dunnam Motor remitted $17,534.70 of this to Transit Bus (R. 225, 249, 250), and, for the 4 busses plus extra equipment and transportation, Transit Bus paid the Ford Motor Company $14,-167.44, of which the Ford company refunded $397.64 as excise tax, leaving a net total of $13,-769.80 (R. 123–125, 141, 142, 143, 177, 180, 200–201, 248–249). The profit to the sellers on this deal was, therefore, $6,775.00, or 33.73% figured on a commission basis, including the $397.74 excise tax refund which was never repaid to the City of Alexandria (R. 248–251, 255). The profit on the two bus deals thus averaged 29.87% per unit.

Shortly after the consummation of this transaction, Hayne of Dunnam Motor paid petitioner Ben F. Bradford $900 in cash for having brought about the two bus deals (R. 225–228, 235). The $900 was never remitted to the city (R. 82). Later, on Christmas Day 1939, petitioner Ben F. Bradford told H. H. Harris, foreman of the Rapides Parish Grand Jury, that Mayor Lambkin had received $2,000 on the transactions but that this could not be proved and that some of Mayor Lambkin's "kinfolks" were down before the grand jury "telling off on him" (R. 388–390).

ARGUMENT

I

There clearly is no merit in petitioners' contention that, for the reasons discussed below, the evidence was insufficient to support the verdicts of guilt returned against them under the first count.

1. Petitioners assert that no fraud was perpetrated upon the City of Alexandria, because "the testimony of all the witnesses * * * established conclusively that it was impossible for the City to have bought these busses any cheaper; that they could not have been bought directly from the factory, and that the prices paid were exceedingly reasonable" (Pet. 9–10).

In the first place, the question as to the reasonableness of the prices the city paid for the 12 busses is not conclusive of the question whether a fraud was perpetrated upon it. The scheme whereby petitioner Ben F. Bradford derived a secret profit of $900 from the bus deals in violation of his fiduciary position as commissioner of the city was a fraudulent scheme under the mail fraud statute. *Pandolfo* v. *United States,* 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term; *Glover* v. *United States,* 125 F. (2d) 291 (C. C. A. 5), certiorari denied, May 25, 1942, No. 1158, October Term, 1941; *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A.

5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *United States* v. *Buckner,* 108 F. (2d) 921, 926, 927 (C. C. A. 2), certiorari denied, 309 U. S. 669. The city was further defrauded when Ahrens promised and paid petitioner William T. Bradford a commission of $2,000, an amount which Ahrens would have deducted from the sale price of the busses if the city had been aware of the agreement to pay the commission (R. 215).

Secondly, it is apparent that, contrary to petitioners' contention, the evidence, summarized in the Statement (*supra,* pp. 5–12), supports a finding that the scheme to defraud contemplated, and resulted in, charging the city excessive prices for the busses. Up to the time petitioner Ben F. Bradford became a city commissioner, the indications were that the Mack bus bid would be accepted. Thereafter, the Ford busses, which did not meet the specifications advertised, were purchased without readvertising for bids on new specifications and upon the false declaration that an extreme public emergency existed. There was no investigation of other busses, including the General Motors model which was bid at approximately $1,000 less than the price bid for the Ford bus. No effort was made to buy direct from the Ford Motor Company, despite the fact that other manufacturers customarily sold direct to munici-

palities. Instead of dealing direct with Transit Bus, as it might have done, the city council negotiated with both Transit Bus and Dunnam Motor—the representatives thereof being Hayne, a brother-in-law of Mayor Lambkin's son, and Ahrens, salesman for Monte E. Hart, who was engaged in large scale schemes to defraud—and the prices agreed upon for the first lot of busses resulted in a profit of approximately 15% to Transit Bus, $2,000 of which was given to petitioner William T. Bradford, and about a 10% profit to Dunnam Motor, which would have foregone any profit if necessary to make the deal. The evidence showed that 10% would have been a reasonable profit on the deals. For no apparent reason, the profit to the sellers on the second deal was increased $489.27 per bus, or a total of $1,957.08, over the September 1937 price, and this was brought about in July 1938 by resolution of the city council declaring the existence of an extreme public emergency rather than by advertising for bids, for which they had had ample time.

2. Petitioners state that "there was nothing to show that W. T. Bradford and Ben F. Bradford were associated in this deal, but on the contrary that they were personally and politically opposed one to the other, and that W. T. Bradford did not undertake to influence any of the City Commissioners in the deal that was made" (Pet. 10). We construe this as a contention that the evidence

was insufficient to show guilty knowledge or conduct on the part of petitioner William T. Bradford and as a tacit admission that, if a scheme to defraud existed, Ben F. Bradford participated in it—an admission which is adequately supported by the record (*supra*, pp. 5–12).

The very fact that petitioner William T. Bradford was offered such a substantial commission as 5% of the profits on the first bus deal merely for using his influence (R. 191–193, 211) should have put him on notice that the deal was shady. Ahrens testified that petitioner William T. Bradford did in fact use his influence in connection with the sale of the Ford busses to the city and that he kept Ahrens posted on how things were going (R. 193), thereby participating in the crime. To have used his influence on the deal and kept Ahrens posted, William T. Bradford must have contacted Ben F. Bradford and Mayor Lambkin and must have known of the scheme to defraud. He received $2,000 of the fruits of the crime, and he received it in cash at Ahrens' office in New Orleans—implying a covertness inconsistent with dissociation from the scheme to defraud. This evidence was sufficient to show guilty knowledge[7] and was properly submitted to the jury.

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[7] Cf. *Wilson* v. *United States*, 162 U. S. 613, 619; *Dunlop* v. *United States*, 165 U. S. 486, 502–503; *McNamara* v. *Henkel*, 226 U. S. 520, 524–525; *Husten* v. *United States*, 95 F. (2d) 168 (C. C. A. 8); *Girson* v. *United States*, 88 F. (2d) 358, 361–362 (C. C. A. 9), certiorari denied, 301 U. S. 697;

Cf. Glover v. *United States, supra; United States* v. *Groves, supra; Shushan* v. *United States, supra.*[8]

3. Petitioners take the position that the mailing charged in count 1 of the indictment (R. 5–6) was not in furtherance of the scheme to defraud, because the evidence shows that "the deal" had been consummated before the mailing (Pet. 7–8). The mailing occurred on October 26, 1937, when the Whitney National Bank, New Orleans, Louisiana, forwarded to the Guaranty Bank and Trust Company, Alexandria, Louisiana, for collection,

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Bruce v. *United States*, 73 F. (2d) 972 (C. C. A. 8); *United States* v. *Di Carlo*, 64 F. (2d) 15, 17 (C. C. A. 2); *Niederluecke* v. *United States*, 47 F. (2d) 888, 889 (C. C. A. 8); *Wilkerson* v. *United States*, 41 F. (2d) 654, 657 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Drew* v. *United States*, 27 F. (2d) 715, 716 (C. C. A. 2); *Rosen* v. *United States*, 271 Fed. 651, 655 (C. C. A. 2); *Wolf* v. *United States*, 290 Fed. 738, 744–745 (C. C. A. 2); *Lindsey* v. *United States*, 264 Fed. 94, 96 (C. C. A. 4), certiorari denied, 252 U. S. 583; *Degnan* v. *United States*, 271 Fed. 291 (C. C. A. 2).

[8] Petitioners complain of the following statement of the circuit court of appeals contained in its opinion on petition for rehearing: "No man can be compelled to be a witness against himself, but sometimes in the progress of a trial the burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury" (Pet. 11–12). The court below expressly repudiated petitioners' contention that it meant that an inference of guilt might be drawn from petitioner William T. Bradford's failure to testify (R. 482) and it is clear that the court had in mind the cases (*see note 7 supra*) holding that unexplained possession of the fruits of a crime are *prima facie* evidence of guilt or guilty knowledge (R. 465, particularly n. 4).

the check drawn on the Guaranty Bank and Trust Company by Dunnam Motor in favor of Transit Bus in payment of Transit Bus' share of the proceeds from the first bus deal (*supra,* p. 9).

The indictment charged and the proof showed the devising of a fraudulent scheme to secure secret profits from two sales of busses to the city, one in September 1937 and the other in July 1938, at excessive prices (*supra,* pp. 5–12). Since petitioner William T. Bradford received his $2,000 profit on December 10, 1937, and petitioner Ben F. Bradford his $900 profit in July 1938 (*supra,* pp. 11, 12), the scheme to defraud had not terminated in October 1937 and the mailing of the check, which was intimately connected with the distribution of the fraudulent proceeds, was in furtherance of the scheme. *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; cf. *McDonald* v. *United States,* 89 F. (2d) 128, 133–134 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Skelly* v. *United States,* 76 F. (2d) 483 (C. C. A. 10), certiorari denied, 295 U. S. 757.[9]

II

Petitioners contend that fatal error resulted from the overruling by the trial court of their

[9] The cases cited by petitioners in this connection (Pet. 8–9) are all factually distinguishable from the instant case.

motion in arrest of judgment (R. 31) based upon the ground, first raised by motion to reopen and for rehearing after the overruling of a motion for a new trial (R. 23–30), that one of the jurors, James G. Russell, Jr., was not legally drawn for jury service (Pet. 12–13). The contention is predicated upon a showing that the name "James G. Russell" was drawn by the jury commissioner, that James G. Russell, Jr., was summoned and served on the jury, and that there are two James G. Russells, father and son, who are commonly known and sign their names as "James G. Russell" and "James G. Russell, Jr.," respectively (R. 23–29).[10]

It is impossible to assume conclusively, from the showing made by petitioners, that the James G. Russell drawn for jury service was not the same one who was summoned and actually served on the jury. Even if the assumption be made, however, it is apparent that the mistake was merely a technical error which did not affect the substantial rights of petitioners, for they make no contention that James G. Russell, Jr., was not a qualified juror or that they were prejudiced by his service on the jury which convicted them. Under the circumstances, the error, if such it was, is not fatal. Section 269 of the Judicial Code (28 U. S. C.

[10] The record does not show that "James G. Russell" was the name drawn and that "James G. Russell, Jr.," was summoned, but apparently these facts were revealed in the files of the trial court.

391); cf. *Morris* v. *United States,* 112 F. (2d) 522, 527 (C. C. A. 5), certiorari denied, 311 U. S. 653; *Chadwick* v. *United States,* 141 Fed. 225, 243–245 (C. C. A. 6); *Bush* v. *United States,* 16 F. (2d) 709, 711 (C. C. A. 5); *Hoyt* v. *United States,* 273 Fed. 792, 799 (C. C. A. 2).

III

Petitioners also make the contention that the trial court erred in refusing to permit the witness Moriarity to testify as an expert at the hearing on their motion for a new trial (Pet. 13–14). This witness was offered to show that the breakdown as to the costs of the busses, made and submitted in evidence at the trial by Government witness L. O. Taylor (R. 244–254), was erroneous (R. 419, 423). Moriarity was present at the trial, listened to Taylor's testimony, and afterwards made a cost break-down of his own, figuring the extras in a manner unwarranted by the evidence at the trial and arriving at a lower percentage of profit on the bus deals than had Taylor (R. 412–418, 420–422). The court heard Moriarity's testimony off the record and refused to receive it in evidence on the grounds that "the price basis upon which he calculates would not be applicable" and that "It has not been shown that his experience would permit him to testify to a transaction of this peculiar nature" (R. 422–423; cf. R. 418–419).

Whether Moriarity was in fact qualified as an expert, as petitioners contend (Pet. 14), is immaterial here. The disposition of the motion for a new trial rested in the sound discretion of the trial court (*Weiss* v. *United States,* 122 F. (2d) 675, 691 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Jordan* v. *United States,* 120 F. (2d) 65, 67 (C. C. A. 5), certiorari denied, 314 U. S. 608; *United States* v. *Holt,* 108 F. (2d) 365, 369 (C. C. A. 7), certiorari denied, 309 U. S. 672, rehearing denied, 309 U. S. 698; *Sanchez* v. *United States,* 108 F. (2d) 735, 736 (C. C. A. 5), certiorari denied, 309 U. S. 679; *Smith* v. *United States,* 106 F. (2d) 726, 727 (C. C. A. 4)) and the denial of the motion will be reviewed only for abuse of discretion (*United States* v. *Hartenfeld,* 113 F. (2d) 359, 362 (C. C. A. 7), certiorari denied, 311 U. S. 647; *United States* v. *Dressler,* 112 F. (2d) 972, 976 (C. C. A. 7); *United States* v. *Holt; supra.* See also, *Fairmount Glass Works* v. *Coal Co.,* 287 U. S. 474, 481). Since the cost breakdown offered through Moriarity was not newly discovered evidence and there is nothing in the record to show that it was so material that it probably would have produced a different verdict,[11] it

[11] The record does not reveal the precise difference between the cost break-downs of Taylor and Moriarity. However, there was evidence at the trial to show that the percentage of profit to the sellers was 20% above a reasonable profit (*supra,* pp. 10–11, 12), whereas Moriarity's break-down, figuring extras differently, could hardly have changed the percentage more than 5%, if that.

is clear that the trial court did not abuse its discretion in denying the motion for a new trial and that, therefore, the refusal to receive Moriarity's break-down in evidence was not error. See *Weiss* v. *United States, supra.*

CONCLUSION

The case was correctly decided below and no conflict of decisions or important question of law is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
MELVA M. GRANEY,
Attorneys.

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